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November 1, 2011

Justice Michael Nenno
Cattaraugus County Courthouse
Supreme and Family Courts
One Leo Moss Drive
Olean, NY 14760

Sent via Fed Ex

Re: Concerned Citizens of Allegany County et al v. Town of Allegany et al;
Index No. 2011-79455

Dear Justice Nenno;

Enclosed please find the Petitioners' Reply Brief submitted in support of their pending Article 78 action returnable before you on November 4, 2011 at 1 p.m.

I also expect to have hand delivered to you tomorrow, and electronically mailed (and mailed) to opposing counsel, a Supplemental Affidavit responding to facts alleged in a municipal respondent's affidavit provided with the municipal agencies' responses.

Respectfully submitted,

Richard E. Stanton,

Cc: Dan Spitzer, Esq. (via Electronic and Regular Mail)
James Muscato, Esq (via Electronic and Regular Mail)

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUGUS

CONCERNED CITIZENS OF CATTARAUGUS COUNTY, INC., and KATHY BOSER,
Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

Index No. 2011-79455

Against

Honorable Michael L. Nenno

THE TOWN OF ALLEGANY PLANNING BOARD, THE TOWN OF ALLEGANY TOWN BOARD, THE TOWN OF ALLEGANY ZONING BOARD OF APPEALS, THE TOWN OF ALLEGANY CODE ENFORCEMENT OFFICER, and ALLEGANY WIND, LLC,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF ARTICLE 78 PETITION

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TABLE OF CASES

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I. PRELIMINARY STATEMENT

The Petitioners have challenged the lawful authority/jurisdiction of the Town of Allegany Planning Board to issue a Site Plan approval beyond the parameters of the Ordinance which provides them Site Plan Approval authority on commercial wind energy conversion systems, and at a time when the proposed use was not lawful.

The Respondents collectively have challenged the timeliness of the Petitioners' actions, and their standing to maintain claims to protect against adverse environmental impacts of the proposed project on their property.

Respondent The Town then attempted to address one of the key substantive issues of whether noise impacts approved exceed statutory authorizations and regulatory guidance standards, averred conclusions and findings beyond their Certified Administrative Record (the "Record"). The new theory not supported by underlying facts, or findings in the Record is that the domicile where the CCCC Petitioner member Ted Gordon sleeps every night, washes, bathes, walks his dogs, and lives his life, is not a "residence,.... or other similar facility" . The facts that Ted Gordon's home was identified as being within 2,500 feet of the turbines by Allegany Wind in their setback map of January 2010 (R. 616, and that the turbines will increase ambient noise levels by more than 3 dB at night at his home, and that the planning board was not authorized to grant an increase of 3 dB at any residence or similarly used property were not disputed in the responding papers.

A second critical departure from any established finding in the Record was that the required ANSI standards set forth in the Ordinance could be replaced by other guidelines not approved by the legislative body.

II. REPLY FACTS

All parties have submitted an extensive Statement of Facts in support of their positions. This set of Reply Facts is only intended to respond to:

1. The new alleged fact and conclusion that Mr. Gordon's home is not a "residence"; and
2. the assertion that the Sound Assessment provided by the Developer were determined to meet the Standards prescribed by the 2011 Amendments to the Ordinance.

A. The Only Conclusion That Flows from the Record is that the Structure which is Mr. Gordon's Home is a "Residence", or "Other Similar Facility".

As set forth in our initial papers the ordinance gives limited approval authority to the Planning Board. In addition to the stringent studies that must be submitted before approval, which specifically include low-frequency noise assessments meeting specific standards (see appendix B), the approval authority has objective limits which are:

the sound level from the operation of a commercial WECS shall not increase by more than 3 dB(A) the nighttime or daytime ambient sound level at any sensitive noise receptors, i.e.., Residences, hospitals, libraries, schools, places of worship and similar facilities within 2,500 feet of the turbine and/or at other sensitive the receptor points that may be identified by the Planning Board.

Responders do not dispute the sound pressure threatened by the Project at 180 Chipmonk Rd. where Mr. Gordon lives would exceed thresholds which would allow the Project to be approved . In fact his home was identified by Allegany Wind in their Setback map submitted dated January 10, 2010 and submitted as an attachment to the DEIS. However, they respond within affidavit of a Mr. Dzuroff that Mr. Gordon's home should not be considered a "Residence" entitled to the protections by the Ordinance. The crux of Mr. Dzuroff's Affidavit, (i.e that Mr. Gordon is not a person entitled to the protection of the Town's Ordinances) opinions are manufactured after the Boards acted and litigation was commenced, and appear to be based upon an irrational reading of the text of the Ordinance, and conclusions concerning assumed facts about Mr. Gordon's residence which are not in the Record. Based upon the Supplemental Affidavit of Ted Gordon (submitted herewith) it appears Mr. Dzuroff fundamental assumptions that Mr. Gordon lives in a landlocked parcel, built the home illegally, and does not pay taxes on the property are all false.

The undisputed facts are that Mr. Gordon does lives at 180 Chipmonk Road. He maintain his home and land which he purchased there in 1997. He pays taxes on the property. He has dedicated access granted by a surrounding land owner. He sleeps there.. He bathes there. He

walks his dog there. In fact prior to the Planning Board vote, one of the Town Board members visited him there and raised the unanswered question of what impacts the turbines would have on Mr. Gordon's property (See Petitioners' Exhibit 2, p.4, para. 14). The fact that Mr. Gordon's home was a sensitive receptor was raised by the Petitioners in their written submission, and his home was identified in the Record (See R. 616). The argument that was recently thrown by the municipal Respondent that Mr. Gordon should not be entitled to quiet enjoyment of his home, was based upon the rank and wrongful..

While the term "Residence" is not defined in the Ordinance, it is term of ordinary usage, and clearly defined in Black's Law Dictionary, Seventh Edition as follows:

1. The act or fact of living in a given place for some time;
2. place where one actually lives, as distinguished from a domicile;
3. the place where Corporation or other enterprise does business or is registered to do business;
4. a house or other fixed abode; dwelling

The structure which is Mr. Gordon's home meets each of the three definitions of 'Residence" which apply to natural persons. Even assuming *arguendo* there was a missing component, it would be an actual "similar facility" within 2,500 feet of the Project.

The respondent Town of Allegany The Town's Wind Energy Regulations at issue (attached as Appendix A to The Petitioner's Brief in Support of Article 78 Petition, and hereinafter referred to as the Ordinance) was enacted for the "purpose" of ensuring that

development of commercial wind energy conversion systems would have a minimal impact on the adjacent properties, and to protect the health safety and welfare of residents of the Town. (See Ordinance 5.25 (A)(Intent and Purpose)). It is also consistent with the intent of the Ordinance that Mr. Gordon's home is entitled to the protection of the Ordinance, and the Court should not accept the post decisional unsupported speculation, that because an inspector lacks information about the Property, he can fill in the gaps in his own knowledge base to the needs of the developer after the record is closed; and then based upon his rank conclusions conclude the home of a man is not a "Residence".

Neither Respondents' papers set forth any basis to challenge the submission that Ted Gordon, and Petitioners' council raised the issue that Mr. Gordon lived within 2,500 feet of the proposed turbines, and that this matter was expressly discussed with a councilperson. In fact it appears Allegany wind LLC expressly acknowledged his residence and unsuccessfully attempted to negotiate an easement to allow excessive noise to cross his residence. Nowhere in the record below, or in the responses, is there any evidence that a conclusion was drawn that the place where he sleeps every night, bathes, washes, walks his dog, eats, and lives would be determined not to be a residence or similar facility. Nor, was Ted Gordon ever given notice and the reasonable opportunity to be heard regarding the possibility that his home would be discounted from the areas to be considered a sensitive receptor. In fact his home was considered for one of the places to take background noise studies in the public meetings (See R. pp.).

It appears that the novel theory that the structure of the home of an individual is not a "residence", "or similar facility" is a theory that emerged after the unlawfulness of the Planning Board's actions were challenged in the Petition.

B. The Affidavit of David Britton, PE, Does Not Negate the Requirement of the Ordinance That the Measurement of the Sound Pressure Level Be Done According to the American National Standard, Quantities and Procedures for Other Accepted Procedures.

In addition to refusing to follow the limits of sound pressures introduced to sensitive receptors under the Ordinance they also refused to follow the ANSI standards prescribed by the Ordinance, or expressly find how other standards were acceptable. The 2011 Amendments to the Ordinance prescribed use of the ANSI standards through the following language:

> A WEIGHTED SOUND PRESSURE LEVEL — The sound pressure level measured in decibels (dBA) and is equal to 20 times the logarithm to the base 10 of the ratio of root mean square sound pressure to a reference sound pressure, weighted by frequency band following standard procedures. The reference sound pressure in air is $2 * 10^{-5}$ Pascals. The measurement of the sound pressure level may be done according to the American National Standard, Quantities and Procedures for Description and Measurement of Environmental Sound (ANSI/ASA S12.9-1993, Parts 1,2 and 3, Reaffirmed by ANSI April 2008), published by the Acoustical Society of America (ASA) and the American National Standards Institute (ANSI), or other accepted procedures.

Rather than establish in the Administrative record the ANSI standards were applied, or other standards were determined accepted by the legislative body, they rely on an

Affidavit which is beyond the record that in essence argues an outside consultant thinks it would be appropriate to use less protective standards, but the substituted less protective analysis was never presented to the legislative body.

III. ARGUMENT

A. THE PETITIONERS' ACTIONS CHALLENGING BOTH THE PLANNING BOARD'S LAWFUL AUTHORITY TO ACT, AND THE TOWN BOARD'S ULTIMATE APPROVAL OF THE LAWFULNESS OF THE LAND-USE AT ISSUE ARE TIMELY

1. The Challenges to The Planning Board's Authorization to Site Plan Approval are Jurisdictional in Nature, and not Subject to the 30-day Statute of Limitations Provided for in Town Law Sect. 274-a(11)

As is set forth in the Petitioners initial Brief, the power to regulate how land is used within a town, is vested in town boards pursuant to section 261 of the Town Law. Town boards are then authorized to create administrative bodies to administer land-use regulations within the limits set forth in ordinance or local law. (See Petitioners' Brief in Support of Article 78 (hereinafter Petitioners' Brief) pp.9-13). Here, the Planning Board's authorization to grant Site Plan approval for commercial wind energy conversion systems is both granted, governed, and restricted by the Ordinance.

As is clearly set forth *In the Matter of Eastport Alliance v. Lofaro*, 13 A.D. 3d 527, 787 N.Y.S. 2d 527 (2004), "where a local land-use agency acts without jurisdiction approving or denying a site plan... a challenge to such an administrative action, as ultra viries is not subject to

30 day limitation....." See Matter of Eastport Alliance 787 N.Y.S. 2d @ 348-349 citing Fourth Department decision matter of Sullivan v. Dunn, 298 A.D. 2d.974, 975, 747 N.Y.S. 2d 666 (2002).

In *Eastport Alliance* the failure which was found to render the decision jurisdictionally defective, and thus not subject to a 30 day statue limitations, was the failure of the Planning Board to strictly comply with the Administrative Code of the County of Suffolk which required referral to the county's planning agency prior to action.

The defect in Dunn was the failure to set forth in an approval letter the specific vote of each member of the zoning board granting of variance there. The failure to follow the strict mandates of the statutory or local ordinance authority for an administrative body's actions is a jurisdictional defect, not subject to the 30 day statute of limitations.

Here, the Petitioners are not alleging actions may be commenced at any time (not subject to the limitations of latches, or other applicable law) but rather that the 30 day time period, for challenging arbitrary or capricious activities does not apply when an administrative body takes action beyond the powers that are granted by the legislative body through ordinance. Here, no site work has commenced, and upon information and belief all final approvals are not in place for the project to go forward, and there is no vesting of rights for commencement of construction in reliance upon the action challenged so as to trigger other equitable limitations to the timeliness of the action.

2. **Because the Ordinance of the Town of Allegany Vested the Ultimate Decision to Approve the Project in the Town Board, Petitioners Could Not Exhaust Their Administrative Remedies until They Made Their Final Comments to the Town Board, and the Town Board Acted.**

Section 5.25 (B)(1) of the Towns Ordinance provides:

> No Commercial WECS shall be constructed, reconstructed, modified, or operated in the Town of Allegany except in a Wind Energy Overlay Zone created by the Town Board. Prior to construction of any commercial WECS, the project proponent shall first obtain Special Use Permit and Site Plan Approval from the Town of Allegany Planning Board and a Building Permit from the Town's Code Enforcement Officer.
>
> Upon receipt of an application, the Special Use Permit and Site Plan Approval shall be processed by the Planning Board in accordance with this Section. The rezoning request will be referred to the Planning Board as required by Section 12.02 of this Ordinance, except that the Town Board may wait until the Planning Board has completed its application review, and any variances the Zoning Board of Appeals has granted, if required, prior to holding its public hearing. Upon completion of the Special Use Permit and Site Plan and the Town Board shall consider rezoning request. The Town Board and Planning Board may, if they wish, hold joint public hearings.

The above referenced ordinance set forth a scheme wherein the request for the necessary rezoning to create a commercial wind energy conversion system would first be referred to the Planning Board, as any other request for a rezone, and site plan review already in use would not become lawful, and thus the local approvals not final, until the Town Board voted on the Wind Overlay Zone approval. The Town Board in creating this statutory scheme reserved ultimate approval authority unto itself. By reserving ultimate authority in themselves they rendered the Planning Board's approval advisory to them. See *Price v. Common Council of The City of Buffalo*, 3 Misc. 3d 625 (2004).

In *Price* the City of Buffalo had a similarly regulatory scheme for helipads, to that adopted by the Town of Allegany here for wind turbines. In both approval schemes authorized by local ordinance, Site Plan approval applied to such projects, but ultimate decision-making authority for approving the lawfulness of the use was retained in the legislative body. In *Price*, the city's Planning Board SEQRA findings were set aside, because it was an entity that was not the ultimate decision-maker and thus they were not an authorized lead agency. It is submitted that potential confusion arises as to the accrual of the statute of limitations due to the inappropriate, and ineligible lead agency making the initial SEQRA findings. See *Price*; see also *Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y., 72 NY2d 674, 681, 532 NE2d 1261, 536 NYS2d 33 [1988]; Purchase Envtl. Protective Assn. v Strati, 163 AD2d 596, 597-598, 559 NYS2d 356 [1990]*).

We agree with the Respondents that the Court of Appeals decision in *Stop-the- Barge v. Cahill*, 1 N.Y.3rd 218, 771 N.Y.S. 2d 40 (2003) holds that an action becomes final and "statute of limitations for SEQRA purposes begin to run when the developer has the ability to proceed with the project" (See Town of Allegany Brief, p.17, note 67). However, because the Board retained ultimate decision authority unto itself, and the developer was unable to proceed with the project until the Town Board's adoption of the Wind Energy Overlay Zone at the meeting of August 26th, 2011, the SEQRA challenges did not become ripe and the applicable statutes of limitations did not begin to run until after the Town Board's actions.

In *Walton v New York State Department of Correctional Services,* 2007 NY Slip Op 1384; 8 N.Y.3d 186; 863 N.E.2d 1001; 831 N.Y.S.2d 749;(2007) the Court of Appeals interpreted and distinguished their earlier decision in Stop-the Barge, as we do here. Before the court in *Walton* was when an action became ripe for review, and thus the statute of limitations began to

run, when multiple agency determinations were necessary before the action which was at issue could take effect. The Court's identification of the issue, and rational for determining that the Statute commences to run with the final approval is set forth below:

> The more difficult question is when the statute of limitations began to run. A petitioner who seeks article 78 review of a determination must commence the proceeding "within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). An administrative determination becomes "final and binding" when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party."
>
> In this manner, DOCS's determination remained subject to corrective action by DOCS until the date of the PSC order. The present case therefore differs from Stop-The-Barge v Cahill (1 NY3d 218, 803 NE2d 361, 771 NYS2d 40 [2003]). [***1007] There petitioners challenged actions by the New York City Department of Environmental Protection (DEP) and the New York State Department of Environmental Conservation (DEC), giving approval to a power generator project. We held that the statute of limitations applicable to the cause of action against DEP began to run when DEP issued a conditioned negative declaration (CND), rather than when DEC issued an air permit. We reached this conclusion in part because the CND marked the point at which the review process by DEP, the agency petitioners challenged in this claim, was complete (see 1 NY3d at 223; see also Eadie, 7 NY3d at 317). ...
>
> In deciding the point at which petitioner's administrative remedies are exhausted, courts must take a pragmatic approach and, when it is plain that "resort to an administrative remedy would be futile" (Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57, 385 NE2d 560, 412 NYS2d 821 [1978]), an article 78 proceeding should be held ripe, and the statute of limitations will begin to run. But hindsight cannot be used to determine whether administrative steps were futile.

Until the Wind Energy Overlay District was created, any site plan approval purportedly granted by the ministry body authorized to review site plan was only advisory, and an authorization to proceed to construct an unlawful use of the land. Although poorly articulated in the administrative code, the site plan review for wind turbine projects

outside of wind energy overlay districts merely serves the same purpose as a referral of a rezone application to a planning board, and an early coordination of the environmental review of the project.

The fact that Planning Boards are only advisory in the creation of zoning overlay district is consistent with Salkin, New York Zoning Law and Practice, which was also cited by the Respondents as authority for the interpretation of the Ordinance. In Chapter 24 of the cited treatise the author clearly states "the planning board's function in the legislative process is advisory in character, the power of decision being in the legislative body, it is required to support its recommendations to the legislature by determining whether the proposal conforms to the Master Plan, whether it meets the objectives of the ordinance, whether it is conceptually sound, and whether there are adequate services and facilities." The author then as authority for her consistent interpretation as to the limited role of Planning Boards in actions ultimately requiring legislative action cites *Todd Mart, Inc. v. Town Bd. of Town of Webster*, 49 A.D.2d 12, 370 N.Y.S.2d 683 (4th Dep't 1975 for the rule of law that "under an ordinance which authorizes the creation of a Planned Shopping Center District within a C-S District, and specifies a procedure which includes an initial review by the legislative body, a planning review, and a final amendment of the ordinance by the legislative authority, the final step is legislative in character and will be reviewed as such.

For all the reasons set forth above, the Planning Board did not have ultimate decision-making authority to allow the project to go forward. At any time prior to the Town Board action, the Town Board could have determined not to render the land use lawful. Because the appeals to the Town Board who were considering the Planning Board's action as part of their legislative process could

have been proven to be fruitful, the judicial challenges to Planning Board action were not rendered ripe for review until after the Town Board acted. Garth v. Town of Perinton Board of Assement ***2011 NY Slip Op 6701; 930 N.Y.S.2d 164;*** **(Fourth Dep't 2011)*2011 N.Y. App. Div. LEXIS 6621*** Accordingly the Statute of Limitations did not commence to run until after the filing of the August 26, 2011 Town Board decision.

B. THE PETITIONERS WHO FALL WITHIN THE CLASS OF PERSONS WHICH THE TOWN'S WIND ORDINANCE WERE INTENDED TO PROTECT, HAVE STANDING TO MAINTAIN THE INSTANT ACTION.

The Court of Appeals recently articulated in *Save the Pine Bush v Common Council of the City of Albany* 13 N.Y.3d 297; 918 N.E.2d 917; 890 N.Y.S.2d 405 (2009) that petitioners must show "that the threatened harm of which petitioners complain will affect them differently from "the public at large." In *Save the Pine Bush* the Court expanded upon the previous rule of *Society of Plastics Indus. v County of Suffolk (*77 NY2d 761, 573 NE2d 1034, 570 NYS2d 778 [1991]), which held in order to have standing, a party must demonstrate an "injury in fact"--an actual legal stake in the matter being adjudicated--which falls within the "zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted" (id. at 772-773).

The petitioners meet both the expanded grant of standing under *Save the Pine Bush*, as well as the underlying more restrictive rule of standing contained within *Society of Plastics.* In *Save the Pine Bush,* the petitioners did not live adjacent to, or even within eyesight of the proposed hotel development being challenged, but rather used an adjoining parcel for recreational activities including the enjoyment of rare species of nature. There, the group was found to have

organizational standing when their enjoyment of nature for which they were formed was threatened. Here, the threat is to the natural setting of the individual homes of the petitioners. In particular the petitioners are seeking to protect their homes from loud, and low-frequency noise, as well as flicker caused by the stationary turbines. Their desire to protect their actual property interests in which they have vested rights. See *Matter of Many v. Village of Sharon's Springs Board of Trustees*, 218 A.D.2D 845, 846; *Chase v. Board of Educ. Of Roxbury Cent. School District*, 188 A.D. 2d 192, 199; *Long Island Pine barons Society Inc. v. Town of Islip.*, 261 A.D. 2d 474,475. (1999). In each of the foregoing cases, the individual property interest of the petitioners which conferred standing to them was the protection of their real property which was threatened by the project. Here, in the affidavit submitted which accompany the petition, each petitioner sets forth the potential adverse environmental impacts to their real property interests.

In addition to meeting the traditional real property cases test of standing, and the Court of Appeals standard set forth in *Save the Pine Bush*, the environmental harms the petitioners seek protection against are the exact same identified as concerns in the adoption of the Ordinance at issue. The Ordinance provides a clearly stated purpose as follows:

> The purpose of these regulations for Commercial Wind Energy Conversion Systems (WECS) is to ensure that development of these facilities will have a minimal impact on adjacent properties and to protect the health, safety and welfare of residents of the Town. Specifically, regulation of the siting and installation of wind turbines is necessary for the purpose of protecting the health, safety, and welfare of neighboring property owners and the general public. Wind Energy Facilities represent significant potential aesthetic impacts because of their large size, lighting, and shadow flicker effects. If not properly regulated, installation of Wind Energy Facilities can create drainage problems through erosion and lack of sediment control for facility sites and access roads, and harm farmlands through improper construction methods. Wind Energy Facilities may present a risk to bird and bat populations if not properly sited. If not properly sited, Wind Energy Facilities may present risks to the property values of adjoining property owners. Wind Energy Facilities are significant sources of noise, which, if unregulated, can negatively impact

adjoining properties. Construction of Wind Energy Facilities can create traffic problems and damage local roads. Wind Energy Facilities can cause electromagnetic interference issues with various types of communications.

Based upon the plain language of the statute petitioners seek court intervention to defend their properties against noise exceedances and flicker, and state the express concerns to adverse impacts on the environment which the ordinance was intended to protect against. Thus when the Petitioners attempt to protect the serene environment in which they reside, they fall within the zone of interests under both SEQRA, and the Town's Ordinance, and thus pass the Society of Plastics test for standing as well.

C. THE RESPONDENTS MAY NOT BASE THEIR DECISIONS ON ASSUMED FACTS, AND RECENTLY ADOPTED THEORIES, WHICH ARE NOT SUPPORTED IN THE RECORD

1. The Conclusion submitted that 180 Chipmonk Road is not a "Residence...or other similar use" is not made or supported by the Record, and is Beyond the Power of an Agent of the Executive Branch of Government.

i. The Theory That Mr. Gordon's Home is Not a Residence is Not Supported by the Administrative Record, and was not even made by the Agencies whose Actions are Challenged.

It is fundamental that the Administrative Record itself must contain the substantial evidence which supports the agency determinations. *Kontagiannis v. Fritts,* 131 A.D.2d 944, 516 N.Y.S.2d. 536 [3d Dept 1987]; *Witzl v. Zoning Bd. of Appeals of Town of Berne,* 256 A.D.2d 775, 681 N.Y.S.2d 634 [3d Dept 1998]; *Welsh v. Town of Amherst Zoning Bd. of Appeals* 270 A.D.2d 844, 706 N.Y.S.2d 281 (4th Dept. 2000); *Sasso v. Osgood 86 N.Y. 2d 374 (1995);*

Pecoraro v. Board of Appeals Town of Hempstead 2 N.Y.3d 608 (2004); *Glacial Aggregates, LLC v. Town of Yorkshire Zoning Board of Appeals,* 19 Misc. 3d 1125 (2008).

The Petitioner group, Ted Gordon, and even the maps prepared by respondent Allegany Wind all identified 180 Chipmunk Rd. as the residence of Ted Gordon . The extensive Finding Statements prepared by the respondents or their counsel contained no finding disputing the fact that 180 Chipmonk Road is a residence. The simple fact is that the Administrative Record lacks substantial evidence to support the post Findings submission that 180 Chipmonk Road is not a residence. The conclusions and theorized facts contained within the Affidavit of Mr. Dzurroff are beyond and post date the closing of the Administrative Record, and adds nothing to support the post litigation emergent theory that Ted Gordon's home was rationally and lawfully excluded from the protections of the Ordinance during the administrative proceedings.

Although the question of "what is a residence" was never raised by the Respondents who now seek to limit Mr. Gordon's home from the protections afforded residences under the Ordinance, if it was raised neither Board would not have been authorized to interpret the term of "residence.... or similar facility" inconsistent with the statutory language or its underlying purposes (*Goodwin v Perales*, 88 NY2d 383, 395 [1996]). An administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations" (*Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 169 [1993], cert denied 512 US 1213 [1994]), and may adopt only rules and regulations which "are in harmony with the statute's over-all purpose" (*Goodwin v Perales,* 88 NY2d at 395).

D. THE APPROPRIATNESS OF PRELIMINARY INJUNCTIVE RELIEF

1. PETITIONERS MEET THE THREE PRONG TEST FOR THE GRANTING OF INJUNCTIVE RELIEF

Application of the traditional factors to be considered in issuance of injunctive relief supports the granting of injunctive relief in this instance. The traditional three part test for the granting of preliminary injunctive relief is: (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of the injunction. *See Merscorp, Inc. v. Romaine*, 295 A.D.2d 431, 743 N.Y.S.2d 562 (2nd Dept. 2002), *citing* CPLR 6301, 6312(a); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 438 N.Y.S.2d 761 (1981); *Clarion Assocs. v. D.J. Colby Co.*, 276 A.D.2d 461, 714 N.Y.S.2d 99 (2nd Dept. 2000). Applying these considerations to the facts of this case, it is clear that the Petitioners are entitled to the relief they seek.

The likelihood of success on the merits does not require establishment of "*certainty* of success." "It is enough if the moving party makes a *prima facie* showing of his right to relief; the actual proving of this case should be left to the full hearing on the merits." *See Tucker,* 54 A.D.2d at 326.

a. <u>The Petitioners Have Established the Requisite Showing of a Likelihood of Success on the Merits</u>

Here the limits on the planning board's lawful authority to grant Site Plan Approval was objectively exceeded when they did not apply the 3 dB limits to the residence within 2,500 feet of the project and other impacted sensitive receptors (the remaining residential petitioners). In addition the objective limits of the authority to approve the project were also

exceeded when there was no finding that standards applied were the equivalent to the ANSI standards which were formally adopted by the local legislative body in the 2011 amendments to the Ordinance.

Here, as is set forth above the case law is clear that when government exceeds the lawful limits of their authority any action or approval granted is void ab initio. Based upon the objective exceedance of lawful authority it is respectfully submitted that the petitioners have established a likelihood of success on the merits.

b. <u>If the Application for Preliminary Injunctive Relief is Not Granted, the Petitioners and the Environment Will Suffer Irreparable Harm</u>

The purpose of Preliminary Injunctive relief is to preserve the status quo so as to avoid rendering meaningless the ultimate adjudication on the merits. (See, *Residential Board of Managers v. Alden,* 178 A.D. 2d 121, 576 N.Y.S.2d 859 (1st Dept. 1991); *New York Auto. Ins. Plan v. New York School Insurance Reciprocal,* 241 A.D. 2d 313, 659 N.Y.S.2d 881 (1st Dept. 1997)).

Here the behemoth nature of the Project and the construction activities will impact immediate and permanent destruction of the environment, and immediate intolerable noise levels on residents and loss of quality of life loss due to the construction of haul roads which cannot be undone. Here some of the Petitioners have their physical well being threatened if the Project is allowed to go forward. Here, preliminary injunctive relief is required not only to preserve the status quo, but also to preserve the quality of the environment for the residents who have invested in the community for generations.

Thus, both the human environment and the natural environment are threatened with

immediate and irreparable harm if the site alterations are allowed to proceed

c. The Balancing of the Equities Supports the Granting of Injunctive Relief

Here the developer voluntarily undertook the risk of moving a project into the residents'backyards, controlling the size of the project which created exceedances of the planning board's statutory authority, failing to limit their off-site impacts to the requirements of the the statutory authority, and in choosing applicable standards and sensitive receptors so they could present the conclusions they wanted.

Here the resident petitioners have invested in their community in most cases for many generations and their investments for the most part the respondent developers voluntarily posing to intrude upon their enjoyment of their properties.

Based upon the voluntary assumption of risks of the developer, in the words protecting quality of life which can never be returned after the physical alterations commence is respectfully submitted that the balancing of equities supports the granting of the injunctive relief.

2. THE PRELIMINARY INJUNCTION UNDERTAKING

While CPLR 6312(b) requires an undertaking whenever a preliminary injunction is issued, it is well settled that the court enjoys wide discretion in setting the amount of undertaking required. *See, e.g., Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 781 N.Y.S.2d 684 (2nd Dept.

2004); *Clover St. Assocs. v. Nilsson,* 244 A.D.2d 312, 665 N.Y.S.2d 537 (2nd Dept. 1997) (the fixing of the amount of an undertaking is a matter within the sound discretion of the court, and its determination will not be disturbed absent an improvident exercise of that discretion). In the event the court is out not out right clear void ab initio the granting of the approvals at issue than the court will have to determine the appropriate undertaking.

In exercising its discretion to determine the amount of the undertaking, the Court should take into account the role that Petitioners play in this case seeking to protect important resources and environmental amenities, and further assuring that public agencies fulfill their legal obligations.

While there are very few cases dealing with this issue as it relates to the State Environmental Quality Review Act, the federal courts in similar cases, under the National Environmental Protection Act (NEPA), have regularly recognized the special role that petitioners or plaintiffs play in upholding these rights. Furthermore, since SEQRA was modeled after NEPA, it has long been held that NEPA cases provide appropriate precedents for SEQRA Law. *See, e.g., Branch Assoces. v. Department of Environmental Conservation*, 146 Misc.2d 334, 550 N.Y.S.2d 769, 776 (Sup. Ct. Albany Co. 1989); *Glenhead-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay*, 109 Misc.2d 376, 387, 438 N.Y.S.2d 715, 722 (Sup. Ct. Nassau Co. 1981), *aff'd* 88A.D.2d 484, 453 N.Y.S.2d 732 (2nd Dept. 1982) (court will "look to the federal courts for guidance"); *Ecology Action v. Van Cort*, 99 Misc.2d 664, 667, 417 N.Y.S.2d 165 (Sup. Ct. Tompkins Co. 1979) ("the federal decisions are relevant as a State Act (SEQRA) was closely patterned upon" NEPA); *Pharmaceutical Soc. of State of New York, Inc. v. New York State Dept. of Social Services*, 50 F.3d 1168 (2d Cir. 1995) (recognizing, in the context of the federal

analogue (F.R.C.P. 65) to CPLR 6312, the public interest exception and affirming the waiver of the requirement that the movants post an undertaking).

The federal courts in NEPA cases have early on recognized this special role that petitioners play. Therefore, it has been stated that "it is common for courts in environmental cases brought by environmental groups or individuals of limited means, particularly in NEPA cases to require little or no security." David Reisel, TEMPORARY RESTRAINING ORDERS, PRELIMINARY INJUNCTIONS AND STAYS PENDING APPEAL IN ENVIRONMENTAL LITIGATION, S85 A.L.I.-A.B.A. 899, 955 (1996) (citing numerous cases); See also *Charles A. Wright, et al.*, 11A FEDERAL PRACTICE AND PROCEDURE CIVIL SECOND EDITION 2954 (1995); *see also People Exrel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 Fed.2d 1319 (9th Cir. 1985) (where the court waived the bond requirement where requiring a bond "would effectively deny access to judicial review."); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975) (bond reduced from $4,500,000 to $1,000 in NEPA suit involving expansion of San Francisco Airport); *Viavant v. Trans-Delta Oil and Gas Co.*, 7 ERC 1423, 1426 (10th Cir. 1974) ($100.00 bond NEPA case); *West Virginia Highland Conservancy v. Island Creek Hole*, 441 F.2d 232, 236 (4th Cir. 1971) ($100.00 bond in a NEPA case where the Nature Conservancy argued that mining activities would disrupt scenic and historic areas); *Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167 (D.C. 1971) (waiving bond requirements of FRCP 65).

As the Court stated in *Morton, supra*, the policy behind the exception is to allow concerned public interest petitioners to obtain judicial review of governmental action:

> To require the plaintiffs in the case at bar to post security in the amount requested by the Government to cover the alleged losses would have the effect of denying three nonprofit environmental organizations from obtaining judicial review of the defendant's actions under NEPA....
>
> * * *

> The requirement of more than a nominal amount as security would in the Court's opinion stifle the intent of the Act, since these three "concerned private organizations" would be precluded from obtaining judicial review of the defendant's actions.
>
> *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp at 168.

New York State Courts have also indicated that, when considering the amount of an undertaking, the petitioners' ability to pay should be taken into account. Moreover, an undertaking should not be made so high that it will deny the petitioners their right to relief. See *Modugno v. Meritt-Chapman Scott Corp.*, 17 Misc.2d 679, 187 N.Y.S.2d 30 (Sup. Ct., Queens, 1959) where the court temporarily enjoined unreasonably loud pile driving noises of a construction project, even though it was connected with a public improvement, and held that plaintiffs would be required to post an undertaking of $5,000 rather than the $1,000,000 suggested by the defendant; *Daytop Village, Inc. v. Consolidated Edison Co.*, 61 A.D.2d 933, 403 N.Y.S.2d 222 (1st Dept. 1978).

Here the Resondent-Developer delayed their own approval process by over a year by failing their DEIS approximately 16 months later than scheduled (See R255, 317, and 325). In addition it appears the Respondent-Developer still does not have all the necessary approvals to pursue their Project, yet the Respondents are now attempting to utilize their willingness to take risk of putting forth their documents necessary for approvals at the last minute to their economic and strategic advantage. They do this by claim their project is at risk of losing government subsidies if review is not truncated. They further seek the Court to shift the financial risk of their delay on to the Petitioners who seek to lawfully protect their homesteads..The Respondents attempt to utilize their own delay, and ability to absorb risk as a sword to prevent the Petitioners ability to require their local government to comply with the ordinances intended to protect their own public health safety and welfare. Here the attempt to shift the risk voluntarily incurred by

the Respondents, to the Petitioners should be rejected as inequitable, and against the public interest.

IV. CONCLUSION

It is respectfully submitted that the Planning Board exceeded the authority granted to it by the Town Board after they:

a. failed to require as a condition the mandatory mapping of low frequency and audible frequency noise pressures on all the sensitive receptors; and when they

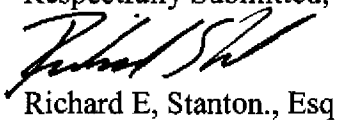
b. authorized an exceedance of greater than 3 Db(A) over ambient night time air on the Gordon residence in complete defiance of the Town Board's response to a request for reduction of the limits of their site plan approval authority; and when they

c. granted Site Plan approval prior to the rezone of the area to a wind overlay district as required under the amendments enacted by the Town Board on February 24, 2011, which provided "No Commercial WECS shall be constructed, reconstructed, modified, or operated in the Town of Allegany except in a Wind Energy Overlay Zone created by the Town Board,"

It is further submitted that the Town Board's, and Planning Board's approvals should both be set aside for the failure to rationally assess the Project impacts on the host

community as required under SEQRA, and the Town Ordinance.

Respectfully Submitted,



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